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IN THE

Supreme Court of the United States

October Term, 1958

No. 900

THE KANSAS CITY SOUTHERN RAILWAY CO., *Petitioner*

v.

CECIL A. THOMAS, *Respondent*

On Petition for Writ of Certiorari to the Court of Civil Appeals, Ninth Supreme Judicial District of Texas, Sitting at Beaumont

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BRIEF FOR RESPONDENT

To: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Cecil A. Thomas, Respondent herein, respectfully presents this brief in opposition to the Petition for Writ of Certiorari.

Opinions Below

The citation is correct (R. 377). There is no opinion of the Supreme Court of Texas, but it refused Petitioner's Application for Writ of Error on January 8, 1958 (468).

Jurisdiction

Petitioner improperly seeks to invoke the jurisdiction of this Court. There has been no "final judgment" entered in this matter by the Appellate Courts of Texas. This case was reversed and rendered in favor of Respondent, but pursuant to Petitioner's (then Appellee) Alternative Motion in order that Petitioner could file and present a Motion for New Trial, upon the ground of excessiveness. The record to this point does not show that Petitioner has judicially waived the Motion for New Trial. Therefore, it would seem that Section 1257, Title 28, *United States Code Annotated*, would certainly indicate this petition is an improper attempt to invoke the jurisdiction of this Honorable Court.

Question Presented

The Federal question presented here in a State Court suit brought under the Federal Employers Liability Act, is whether a "notched down" plank at the place where the ladder and handholds are located on a railroad gondola car and which was customarily used as a handhold or grabiron by men in switching of cars, was in fact a "handhold" or "grabiron" within the meaning of those terms as used in the Safety Appliance Act.

Statutes Involved

The Statutes involved are Section 1257, Title 28, *U.S.C.A.*; Section 4, Title 45, *U.S.C.A.*

Statement

The Plaintiff in his petition alleged that in addition to certain acts of negligence, the Defendant had violated Section 4, Title 45, *U.S.C.A.*, and that such violation contributed in whole or in part to cause the injuries sustained on the occasion of his fall from one of the Defendant's gondola cars. He further alleged that the Defendant's train was moving in interstate commerce at the time and that both he and the Defendant were engaged in such interstate commerce (R. 12).

The evidence established that the cars in question were being moved for loading of sulphur which was to go to Shipside at Galveston, Texas for export, outside of Texas (R. 94, 95, 96). The testimony revealed that the Plaintiff was injured from a fall to the ground when a wooden railing on the top of the car split when the Plaintiff took hold of it, using it as a handhold in order to pass signals (R. 120, 121).

They were shoving around a curve. The Plaintiff had to throw a switch and the Plaintiff after throwing it climbed up on the car. They had to go around two more curves, and the Plaintiff had to climb up to the top of the car to pass signals to the engine foreman because the engine was out of sight and the engine foreman was ten or twelve cars from the Plaintiff (R. 120).

The gondola cars were used to haul sulphur and were lined with wood on the sides, bottoms and tops (R. 120). There were handholds near the top of this gondola car but one could hardly catch onto it because there is a pretty close clearance there, because it has several board railings around it and the wood was too close (R. 120, 121, 183, 184). In order to pass signals there was no way to stand on top or straddle the top edge without taking hold of the board that formed the top edge of that gondola car (R. 122, 123).

It was dark, there were no lights around (R. 126). The Plaintiff started to the top of the car and the board came off with him and he fell, landing in the ditch (R. 120, 121). The train was moving when he fell (R. 180).

The car in question had a wooden railing on the top, with the end portion cut down (R. 177). The wood was a little too close, with gloves on, to enable a man to get his hand on the top grabiron there, and the switchman will put his arm over (R. 183, 184). The engine foreman himself seldom used the top grabiron. They always threw their arms over there and took hold with the other hand (R. 189, 190, 191). The engine foreman practiced that a whole lot. He generally did it that way. The Plaintiff's duty was to ride the car, pass signals, set a hand brake, throw switches and give the cut off signal for uncoupling the cars (R. 127, 128).

The railing on the top of the car was of oak wood which weather cracks (R. 260). After the Plaintiff was injured the wood railing was removed from the top edge of the gondola car (R. 270). (Ex. P-F).

These were the facts of the case as it was presented to the Jury and upon which they found in answer to Special Issues Nos. 1, 2, 3 and 4 that:

> "(1) The wooden railing placed by the Defendant at the end and top of the gondola car in question was in effect a handhold that could be used by switchmen in coupling and uncoupling cars, (2) was not secure; (3) such condition contributed in whole or in part to cause the injuries of the Plaintiff, and (4) that the wooden railing on the top edge of the Defendant's gondola in question, which was weathered and split, was a dangerous instrument with which to work." (R. 22, 23).

The trial court received the verdict of the jury, but overruled the Plaintiff's Motion for Judgment and entered judgment for Defendant (R. 47).

The Court of Civil Appeals, Ninth Supreme Judicial District of Texas, sitting at Beaumont, reversed the trial court and rendered judgment for the Plaintiff pursuant to the Defendant's Alternative Motion for New Trial on the question of damages, held that "the board that gave way with Appellant (Respondent) was, as a matter of law, something the Safety Appliance Acts required Appellee (Petitioner) to have in secure condition." (R. 379).

The Supreme Court of Texas on December 4, 1957, determined that Petitioner's Application for Writ of Error to the Court of Civil Appeals for the Ninth District presented no error which required reversal of the Judgment of the Court of Civil Appeals, and overruled Petitioner's Motion for Rehearing of such Application for Writ of Error, on January 8, 1958 (R. 468).

Reasons For Not Granting Writ

The reasons for denying the Writ of Certiorari in this instance are twofold.

(1) There is no final judgment from which an appeal should lie, and

(2) The decisions of the Court of Civil Appeals and the Supreme Court of Texas are correct and in conformity with previous decisions of this Court and other Federal Courts.

Argument

I. There is no "Final Judgment" from which an Appeal in the form of a Petition for a Writ of Certiorari Should be Granted.

The last paragraph of the opinion of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas, Beaumont, states:

> "The judgment of the trial court is reversed and the cause is remanded with instructions that judgment be rendered in favor of the plaintiff. *This remand is pursuant to appellee's alternative motion, in order that the defendant may file and present a motion for new trial. By proper counterpoint or cross point, appellee has attacked the jury's finding in respect to damages as being contrary to the great weight and preponderance of the evidence and represents that it desires to prevent this operation by motion for new trial.* See DeWinne v. Allen, Tex. Sup., 277 S.W. 2d 91."

It can be seen that no "final judgment" has been entered from which an appeal or an application for writ of certiorari should lie.

This Honorable Court had declined to take jurisdiction on many occasions when cases where "final judgment" were not first had. Section 1257, Title 28, *U.S.C.A.*; *Republic Natural Gas Co. v. Oklahoma*, 68 S. Ct. 972, 976, 334 U.S. 62; *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.*, 73 S. Ct. 196, 344 U.S. 178; *Radio Station WOW v. Johnson*, 65 S. Ct. 1475, 1478, 326 U.S. 120, 123; *Market Street Ry. Co. v. Railroad Commission of California*, 65 S. Ct. 770, 772, 324 U.S. 548, 551; *Richfield Oil Corp. v. State Board of Equalization*, 67 S. Ct. 156, 158, 329 U.S. 69, 72, 73; and *Gospel Army v. City of Los Angeles*, 67 S. Ct. 1428, 1430, 331 U.S. 543, 546, 547.

However, if Petitioner were to judicially waive its right for the filing of a Motion for New Trial based on the one ground of claimed excessiveness (which Respondent, contends is without merit) before the trial court, which has been afforded them by the State Appellate Court decision, a different question would be presented.

II. The Decision of the Court of Civil Appeals and Supreme Court of Texas are correct.

Judgment should have been properly entered for the Respondent upon the verdict of the jury, since under the law, the proof showing what it did, it was a question of *fact* for the jury to decide that the wooden railing was a statutory handhold, and the jury having so found, the failure to enter judgment for the Respondent and the entering of the judgment for the Petitioner instead would have amounted to an usurpation of the jury function by the Court.

But, even if it be thought that the jury was not entitled to pass on the question of the railing being a statutory handhold, or that their finding did not amount to that, then the trial court should have entered judgment for the Respondent instead of entering judgment for the Petitioner because under the authorities it was a handhold, which should have been secure under the Safety Appliance Act. In this the Court of Civil Appeals of Texas correctly rectified the error of the trial court.

There seems to be no disagreement in the record about what occurred. It was so apparent that the wooden railing placed on the top edge of the gondola car involved was in the nature of a handhold, because of it being notched down at the point of the ladder to a smaller dimension than the balance of the railing, and was customarily used by the switchmen for such handhold, and its use as such was rendered necessary by reason of the fact that the top rung of the ladder or the top grabiron or handhold did not have sufficient clearance so that a gloved hand would get between it and the wooden railing, that the trial court submitted to the jury Special Issues 1, 2 and 3 requiring as to its use as a handhold, its insecurity and its relation to the injury. It is so obvious from the record that each of these findings were amply supported by the evidence that the jury answered them affirmatively, although they did not seek to find the railroad negligent in the other particulars charged as a basis for recovery. It is obvious that the pleadings were supported by the proof adduced and that proof confirmed the pleadings in each detail as to the violation of the Safety Appliance Act.

It was only the error of the trial court in entering judgment for the Petitioner on the verdict that stood in the way of the recovery the Respondent was entitled to receive. This the Court of Civil Appeals of Texas corrected by its judgment.

There is, of course, no question but that the Respondent and other employees of the Petitioner *used* the railing in question as a handhold. That its shape, size, form, place of attachment or method of attachment was not that of an ordinary handhold as is commonly seen, would not alter the use to which the railing was being put, and as was said in the case of *United States v. Boston & M. R. Company*, 168 Fed. Reporter, 148 (Mass.). A portion of the opinion is set out below. That was a case where the railroad was charged with a violation of the Safety Appliance Act in failing to have a grabiron or handhold on the end of a car. The Court charged the jury as follows:

> ". . . If at any place in the end of this car there was not a grabiron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grabiron or a handhold at that point, then I shall instruct you that the law has not been violated in so far as a grabiron or handhold at that point is concerned. Having something there which performs all the functions of a grabiron or a handhold is just the same thing as having what is properly called a grabiron or a handhold at that point. It may not be possible to say that a coupling lever or a ladder is a grabiron or a handhold, but if it affords the same security to a man who may need to use one that a grabiron or a handhold, properly speaking, would afford, then, in my judgment, the statute has not been violated."

It having been seen that this use of the railing was that of a handhold that it need not necessarily be in all respects a handhold that conforms in size, shape, method of attachment and location to other handholds to be a handhold, it is the function of the jury to pass upon whether or not it in effect or actually was a handhold. This was certainly brought out clearly in the case of *Bramlett v. Southern Railway Company*, 82 Southeastern Reporter, 501 (Supreme Court of South Carolina). This was a case in which the Plaintiff was injured by reason of the defective condition of a footboard of an engine which was running backwards while he was attempting to jump on the foot-board. The Federal statute forbids the use of defective running-boards and the board on it which was complained of, is a foot-board and a foot-board is not within the provisions of the Federal statute that was being invoked in this case. In the petition the board was called a foot board. In the answer of the railroad it was called in one paragraph a running-board, in another paragraph it was called a foot-board. In cross-examining the Plaintiff the railroad counsel asked the Plaintiff about the running-board. In the trial of the cause the railroad's attorney used the terms foot-board and running-board interchangeably.

The Court held that the trial court

> ". . . has only left it *properly to the jury to say whether the board was a 'running-board.' If it was a 'running board', then the Plaintiff was within the protection of the statute if it was defective. These were questions of fact.* The judge told the jury that the Federal Statute alone applied."

The Boiler Inspection Act is similar to the Safety Appliance Act in so far as construction of the Act is con-

cerned. In the case of *Davis v. Callen*, 250 S.W. 305 (Tex. Civ. App.) which was a suit for damages under the Boiler Inspection Act by a fireman on the M. L. & T. RR. & S.S. Co. engaged in interstate commerce. While he was manipulating the shaker bar moving the grates in the fire box, it slipped off the lever causing him to fall and be injured.

Affirming a judgment for the Plaintiff, the Court said in part:

> "Appellant was under the absolute duty to keep the shaker bar in proper condition and safe to operate, so that it could have been used by Appellee 'without unnecessary peril to life or limb.' As Congress has used language charging a railroad company with the absolute and unqualified duty to have certain of its appliances in a safe condition at all times, the Supreme Court of the United States has held, in the decisions cited supra, that it is the duty of the courts to do nothing less than give full force to the language of the statute. The charge requested by appellant emasculated the act and measured his duty to appellee by the rules of common law. Therefore the trial court correctly refused to submit it.
>
> "*Appellant would distinguish this case* from those cited, supra, *on the ground that the Interstate Commerce Commission has not promulgated any rule defining how tight the shaker bar must fit over the end of the lever attached to the grates.* In answer to this, it is sufficient to say that his duty in this respect was fully defined by the statute and *submitted to the jury in the charge as given.* As we understand the Safety Appliance Act and the decisions construing them, the Interstate Commerce Commission has the express authority to prescribe the character of appliances to be

> used, *but when this power has not been exercised by it in relation to any particular appliance, the railroad company must exercise its common-law duty in selecting such appliance, but, when the selection has been made and the appliance placed in the hands of an employee, it then rests under the absolute duty to keep it in a safe and proper condition, so that it can be used 'without unnecessary peril to life or limb.'"*
>
> See also to the same effect *Louisville N. R. Co. v. Botts*, 173 F. (2) 164, and *Delevie vs. Reading Co.*, 176 F. (2) 496.

And so it is here, the handrail was not designated by the Interstate Commerce Commission as anything, appliance or anything else, to be or not to be placed on the gondola car in question. However, since the Petitioner saw fit to place such a railing at the place it did, and at the place on the car where the ladder or handholds or grabirons are placed, and notched it out so that it could be used by the employees as a handhold, and which could be used by such employees for greater safety in coupling and uncoupling cars, the Defendant then had the *absolute duty to keep it in a safe and proper condition*, that is secure. Its failure in this instance so to do renders the Petitioner absolutely liable to the Respondent for the injuries to which such insecure handhold contributed in whole or in part.

Any contention that the failure of the Interstate Commerce Commission to prescribe appliances is a ruling that such appliances are not to be considered as appliances or if used need not be made secure, has been definitely laid to rest by this Honorable Court in the cases of *Baltimore & O. Ry. Co. v. Jackson*, 77 S. Ct. 842, 846 (6, 7), and *Shields v. Atlantic Coast Line Railroad Company*, 76 Sup. Ct. 386. In the latter case there was a question whether an

addition of a running-board which was not required by the I. C. C. would be such a safety appliance as would fasten absolute liability on the part of the railroad for failure to keep it secure. This Honorable Court said in deciding this question:

> ". . . The question presented here is whether this device, which for convenience we shall call a dome running board, is a safety appliance within the meaning of Sections 2 and 3 of the Safety Appliance Act of 1910. Act of April 14, 1910, c. 160, Sections 2 and 3, 36 Stat. 298, 45 U.S.C. Sections 11 and 12, 45 U.S. C.A. Sections 11, 12.
>
> "Petitioner brought suit in the District Court, alleging in one count of his amended complaint absolute liability for a violation of the Act and in a second count common-law negligence. *The jury returned a general verdict in his favor.* The Court of Appeals reversed and remanded for a new trial on the negligence count alone, holding that the trial court erred in instructing that the dome running board was a safety appliance. 220 F. 2d 242. We granted certiorari because of the importance of the questions raised as to the proper interpretation of the Safety Appliance Act. 350 U.S. 819, 76 S. Ct. 61."
>
> ". . . Under the authority of Section 3, the Commission in 1911 promulgated regulations still in force providing in detail for one running board running around the perimeter, or at least the full length of the sides, of tank cars. Such a board enables a trainman to walk the length of a tank car between cars adjoining it on either end. The regulations make no mention whatever by any name of dome running boards. Petitioner nevertheless contends that the dome running board is a required running board affording him protection under Section 2.

"The obvious purpose of a dome running board is to provide a secure flooring for those who must perform operations in connection with the tank car dome. Clearly the dome running board has major importance in loading and unloading operations. *But a railroad man of over twenty-five years' experience testified that it also may be used to stand on in order to pass hand signals* or repair minor troubles occurring while the train is en route. The dome running board is an integrated part of the exterior equipment of a tank car; it functions as a permanently attached outside 'floor' near the dome of the car. The testimony showed that *railroad men*, including respondent's employees often *refer to the dome running board as a running board. We hold that it comes within the meaning of the term 'running boards'* as used in Section 2.

"The fact that the Commission in its 1911 regulations under Section 3 *has not specified uniform standards* for dome running boards *is not a binding administrative determination that they are not running boards for the purposes of Section 2.*

". . . The purpose of Section 3 is to standardize the appliances required by Section 2. *But it does not follow that appliances necessary and furnished for the safe use of the car, although not standardized under Section 3, are not within the sweep of Section 2. Clearly, those who work on train cars may have necessarily to rely on the security of a dome running board, although the purposes of that appliance may not require any unhesitating reliance on its uniform characteristics."*

". . . See also Southern Pac. Co. v. Carson, 9 Cir., 169 F. 2d 734, holding a railroad liable under Section 2 for defects in an independent wooden club used to help turn a brake wheel where the wheel itself complied with the Commission's regulations, which made

no mention of the club. We conclude that failure of the Commission to standardize the dome running board need not mean that it was not a required running board under Section 2. *To hold otherwise would relieve railroads from the absolute duty under Section 2 to make safety appliances secure wherever new appliances are adopted which have not yet been standardized by the Commission.*"

". . . At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. *If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by Section 2. Cf. Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 37, 36 S. Ct. 482, 483, 60 L. Ed. 874.

"The Commission, in a brief filed here, contends that only appliances designed to insure safety while the train is in movement are within Section 2, and, therefore, a dome running board cannot be a statutory running board. No case is cited to support this construction. Nothing in the language of Section 2 itself or in its legislative history indicates that it should be read so narrowly. Whether or not an appliance is designed to afford protection while the train is moving may provide the Commission with an appropriate guide for deciding which appliances should be standardized under Section 1. But there is no reason to import such a distinction into Section 2 in order to deny the humane benefits of the Act to those who perform dangerous work on train cars that are not moving. Section 2 is not limited to such running boards as are required only in the movement of the train. The dome running board here was required for the use of the car. Section 2 required it to be safe,

although regulations pursuant to Section 3 had not standardized it.

". . . The judgment below must be reversed and the judgment of the District Court reinstated."

In the instant case all of the points raised and held to rest by this Honorable Court are present in: (a) the Respondent based his suit on both the proposition of negligence and violation of the Safety Appliance Acts; (b) the jury returned a verdict in the Respondent's favor; (c) the Interstate Commerce Commission promulgated regulations providing for the placement and dimensions of handholds, grabirons and ladders; (d) there is no regulation or regulations of a type calling handholds or sill steps leading grabirons away; (e) the Respondent contends that such railing is a handhold required to be secure under Section 4 of the Safety Appliance Acts; (f) railroad cars with such equipment testified that such railing may also be used as a handhold to pull herself up; (g) railroad cars often used and relied on such railing as a handhold and referred to it as such; and (h) there was such an extra car may have occasion to rely on the security of such railing as a handhold, although the purpose of that appliance may not require an unbroken chain as to its uniform dimensions at both thereof. As we view the matter, and as held by this Honorable Court, since the conduct and which was found by the jury and held by the Court of Civil Appeals, to be an object, a handhold which was furnished by the railroad and used by the railroad through its employees, as an appliance necessary for the use of the car, it must be a safe hand or handhold as required by Section 4.

In view of the fact that there will be some contention that the hand that was used by the Inspectors and other employees of the Petitioner was not intended to be a handhold by the occupants of the seats that it was placed there, yet the Petitioner cannot say that it did not know that such hand was used as a handhold when in fact its own foremen used it for such purpose as did other employees.

The Petitioner cannot avoid liability on the contention that it did not furnish such seat as a chattel, which the users thereof knew was not intended for such purpose, for the same general proposition was brought out in the case cited in this charge and in the knowledge of the employer of the use of the appliance for a purpose other than that claimed by the Petitioner goes it to the same position as if the employer had originally furnished it for the purpose.

In the case of Detroit Steel & Iron Company v. Johnson, 61 Southern Reporter 681 (Supreme Court of Georgia) the Plaintiff was working for the Defendant in the shoeing of the mule of the Defendant's boiler house. While working among the mules, Johnson in one end of a piece of timbering and in order to reach the point where the other end had to be nailed attempted to walk along a narrow beam by doing so he came up a beam which ran from the beam diagonally to the wall. The beam appeared to be firmed. In fact it was insecure. In ascending on one around it he caught a hold of the beam. It fell and he with it. He claimed negligence on the part of the employer in maintaining the beam in an insecure condition. The Defendant contended that the beam was not designed to be used as a handhold and therefore there was no liability on the part of the master. The Court had the following to say:

". . . For if the master directs an appliance to be used, or knows that it will reasonably be used for some purpose other than that for which it was originally intended, he puts it in the same position as if he had originally furnished it for that purpose."

In the case of *Wellinger v. Terminal R. Assn. of St. Louis*, 183 S.W. 2d 908 (Supreme Court of Missouri).

In this case the Plaintiff was getting off of a mail truck when the side of the truck gave way, throwing him to the ground and causing him to suffer permanent injuries. The Defendant contended that the Plaintiff had used the side bar of the mail truck for a purpose for which it was not intended and therefore was not entitled to recover.

The Court held:

"In our opinion, we should not hold, as a matter of law, that there was a diversion of the instrumentality for the purpose for which it was intended within the meaning of the qualification of the general principles which we have mentioned supra. Although the primary purpose of the side bars was to retain mail pouches and parcels of baggage upon a platform of the truck, the use of the side bars in alighting should have been anticipated as a convenient, expedient and natural means of getting off the truck. And, in view of the evidence of the practice of the Defendant's employees which Defendant must have known, we believe the Plaintiff's case was clearly submissible *to a jury*."

See also *Kaumans v. White Star Gas & Oil Company*, 63 P. 2d 231; *Wood v. Bichler Mfg. Company*, 208 S.W. 481 (C.A. Mo.); *Hampton v. Pacific Elect. Ry. Co.*, 257 P. (2nd) 703 (Cal. V.C.A.).

While the Statute, under which the Respondent sought his recovery, provides that the secure grabirons should be placed on the cars for "greater security to men in coupling and uncoupling cars," the Statute covers the situation here, even though at the moment of his injury the Plaintiff was not in the act of coupling or uncoupling cars as is held in the case of *Director General of Railroads v. Ronald*, 265 Federal Reporter 138 (CCA 2nd Cir.):

> ". . .But it is not necessary that the employee should be injured while coupling or uncoupling. If the grabiron could be said in getting to the point where the cars were to be coupled or uncoupled, it would be within the section." . . .
>
> "The legislation was clearly for the safety of employees. Coupling and uncoupling cars is, indeed, but one of the many acts that require the boarding and alighting from cars, and in the light of the automatic coupling requirements sections, the need to board and alight from cars solely for the purpose of coupling or uncoupling cars is greatly diminished. The Supreme Court has placed no such construction upon these statutes when it has had the occasion in the past to refer to them."
>
> "In construing the statute, it is essential that we obtain as far as possible the legislative intent. In so doing, we must gather such intent from the title, text and context. Here we must apply common knowledge of danger in alighting from or boarding cars, which we must assume Congress had in mind, and that such danger existed in infinitely more cases than the mere alighting or boarding of cars for the purpose of coupling or uncoupling them."

The Federal Safety Appliance Act and the Federal Employers Liability Act, under which this case has been brought, are to be given liberal construction in order to accomplish their humanitarian purposes. See *Urie v. Thompson*, 69 Sup. Ct. 1018 337 U.S. 163; *Carpenter v. Atchison, T. & S. F. Ry. Co.*, 240 P. 2d 5; *Johnson v. Southern Pac. Co.*, 25 S. Ct. 158; *Colorado v. Central R. Co.*, 180 F. 832, affirmed, 192 F. 901, error dismissed, 33 S. Ct. 111; *In re Second Employers' Liability Cases*, 32 S. Ct. 169; *Horton v. Oregon-Washington R., etc. Co.*, 130 P. 897; *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327; *Bocook v. Louisville & N. R. Co.*, 67 F. Supp. 834; *Lukon v. Louisville & N. R. Co.*, 137 F. 2d 327.

The Acts are remedial and should have a liberal construction to advance the remedy proposed and to correct the evils against which they were directed. They were designed to enlarge—not to restrict—the rights of the injured workmen. *Baltimore, etc. R. Co. v. Branson*, 98 A. 225; *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 F. 949; *Graham v. Thompson*, 212 S.W. 770 (Mo.); *Ermin v. Pennsylvania R. Co.*, 36 F. Supp. 936; *Albright v. Pennsylvania R. Co.*, 37 A. 2d 870, cert. denied, 65 S. Ct. 72.

In the case of *Missouri-Kansas-Texas R. Co. v. Evans*, 250 S.W. 2d 385, the Supreme Court of Texas had the following to say:

> ". . . The protection of the Safety Appliance Act has been held to extend to those inspecting cars. *Idem. The statute 'has been liberally construed' so as to give a right of recovery for every injury, the proximate cause of which was a failure to comply with a requirement of the Act.* Swinson v. Chicago, St. P., M. & O. R. Co., 294 U.S. 529, 55 S. Ct. 517,

79 L. Ed. 1041, 96 A.L.R. 1136; Carter v. Atlanta & St. A.B.R. Co., 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236, (5). In Davis v. Wolfe, 263 U.S. 239, 44 S. Ct. 64, 66, 68 L. Ed. 284, after reviewing the earlier cases, the court held that one can recover "if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

The interpretation of these Acts are controlled by the Federal Statute and adjudications by the Federal Courts. As was said in the case of *Texas and Pacific Railway Company v. C. B. Younger*, 262 S.W. 2d 157, Ref. N.R.E.:

"In the disposition of this interesting and important question we are controlled entirely by the Federal Statute and adjudications by the Federal courts. While suits under the Federal Employers' Liability Act may be maintained in appropriate courts of any state, we are dealing with rights afforded the parties by the laws of the United States and not by state laws. Mondou v. New York, N. H. & H. R. Co., 223 U.S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Chelin v. Houseman, 93 U.S. 130, 23 L. Ed. 833; Seaboard Air Line Railway v. Horton, 233 U.S. 492, 58 L. Ed. 1062; 34 S. Ct. 635; Chesapeake & O. R. Co. v. Kuhn, 284 U.S. 44, 76 L. Ed. 157, 52 S. Ct. 45.

"No substantive right of any party to such suits may be impaired by any local statute, rule of decision, or forms of local practice. Davis vs. Wechsler, 263 U.S. 22, 68 L. Ed. 143, 44 S. Ct. 13; Macy v. Granelli Chemical Co., 303 U.S. 197, 82 L. Ed. 745, 58 S. Ct. 507; Brady v. Southern R. Co., 320 U.S. 476, 88 L. Ed 239, 64 S. Ct. 232; Chesapeake & O. R. Co. v. Staple-

ton, 279 U.S. 587, 73 L. Ed. 861, 49 S. Ct. 442. This immunity extends to the pleadings, and a state's rule that a pleading will be construed strictly against the pleader has no application in a suit in the state court under this Act. Brown v. Western Ry. of Alabama, 338 U.S. 294, 94 L. Ed. 100; 70 S. Ct. 101. And what constitutes negligence for the statute's purposes is a federal question, and it does not vary in accordance with different conceptions of negligence under state laws, and we are governed by federal decisional law in formulating the concept of negligence. Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 96 L. Ed. 398, 72 S. Ct. 312; Urie v. Thompson, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018.

"The character and amount of evidence required to establish negligence in a suit under the Federal Employers' Liability Act is not subject to the control of the states in whose courts such suits are tried, *and therefore whether there is an issue for the jury is a federal question.* Chicago, M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; Chesapeake & O. R. Co. vs. Stapleton, supra; Chesapeake & O. R. Co. v. DeAtley, 241 U.S. 310, 60 L. Ed. 1016, 36 S. Ct. 564."

Under the Federal Employers Liability Act, the question of what constitutes negligence as well as its causal relation to the injury are matters upon which the jury should pass, as is shown by these recent decisions of this Honorable Court:

Thompson v. Texas & Pacific Ry. Co., 77 S. Ct. 698;
Earl R. Dean v. Gulf, Colorado & S. F. Ry. Co., 77 S. Ct. 715;
Ferguson v. Moore-McCormack Lines, 77 S. Ct. 457;
Rogers v. Mo. Pac. RR. Co., 77 S. Ct. 443;

Webb v. Illinois Central RR. Co., 77 S. Ct. 451;
Ringhiser v. C. & O. Ry. Co., 77 S. Ct. 1093;
Arnold v. Panhandle & S. F. Ry. Co., 77 S. Ct. 840;
B. & O. Ry. Co. v. Jackson, 77 S. Ct. 842;
Gibson v. Thompson, 78 S. Ct. Pg. 2.

The fact that the jury also returned a verdict of unavoidable accident and failed to find any negligence on the part of either the railroad or the Respondent would not in itself authorize the entry of a judgment for the Petitioner, particularly in view of the fact that the cause was submitted on both grounds, that of violation of the Safety Appliance Act as well as on negligence under the Federal Employers Liability Act. The jury, having found that the wooden railing was in effect a handhold which was insecure, the insecurity of which contributed to cause his injuries, would rather require the entry of a judgment for the Respondent. In the case of *Givens v. Missouri-Kansas-Texas R. Co. of Texas*, 195 Fed. 2d 225, Judge Rives of the Fifth Circuit rendered the opinion for the Court reversing the trial court which entered a judgment for the Defendant upon similar findings.

The only case cited by Petitioner in support of its contentions is the case of *Atchison, Topeka & Santa Fe v. Scarlett*, decided by this Honorable Court in 1937, reported at 57 S. Ct. 541, 300 U.S. 471, is not authority for a contrary view to this Court's more recent holding in the case of *Shields v. Atlantic Coast Line Ry. Co.*, 76 S. Ct. 386, decided in 1956. The holding in the *Scarlett* case refuted the contentions of the Plaintiff that a brace rod placed diagonally on side of a car under a ladder which did not lessen the statutory or I.C.C. regulatory clearances, amounted to a violation of the Safety Appliance Act. The

holding in the *Shields* case, and the contention of the Plaintiff here, is on the other hand an entirely different matter, it being simply that an additional appliance in the nature of a safety appliance which could be and were used customarily by men in their work in coupling and uncoupling cars, must be as secure as a designated safety appliance or it becomes a violation of the Safety Appliance Act notwithstanding a failure on the part of the Interstate Commerce Commission to issue a regulation requiring the installation on the cars of such additional "safety" appliances.

There is no conflict between the two decisions.

It is the contention of Respondent that the reversal of the Judgment of the trial court should be, for all of the reasons heretofore stated, affirmed and judgment rendered for the Plaintiff as of the date of the entry of the erroneous judgment with interest to run on such correct judgment from that date.

See *Givens v. Missouri-Kansas-Texas R. Co. of Texas*, 196 F. 2d 905.

III. There are no Grounds Under Rule 19 of This Court for Granting a Writ of Certiorari.

A. *The decision is not in conflict with the decision of this or other courts.*

As has been demonstrated heretofore, the decision of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas is not in conflict with the prior decision of this Court or of other Federal Courts, it follows the spirit as well as the letter of the law as laid down

by this Honorable Court in *Shields v. Atlantic Coast Line Ry. Co.*, supra, and *B. & O. Ry. Co. v. Jackson*, supra. Further the opinion is not in conflict with the earlier decisions of Federal Courts and other Courts construing the Federal law, such as the *United States v. Boston & M. R. Company*, 168 Fed. Reporter, 148 (Mass.), *Bramlett v. Southern Railway Company*, 82 Southeastern Reporter, 501 (Supreme Court of South Carolina), and *Davis v. Callen*, 250 S.W. 305. (Tex. Civ. App.).

B. *This is not a decision of an important state question in conflict with applicable state law.*

Since this case involves a Federal question, there is no decision of important state question in conflict with applicable state law.

C. *The decision presents no important question of Federal law.*

The decision presents no important question of Federal law which has not already been decided since the law is clearly followed by the decision in question.

Conclusion

First, there being no "final judgment" from which an appeal could be taken, this Honorable Court is not required to take jurisdiction. If, however, by action of Petitioner, a "final judgment" becomes a certainty, or if this Honorable Court feels that the question presented is such a grave matter that it should exercise jurisdiction, then Respondent earnestly contends that the Petition for Writ of Certiorari should be denied for the additional reasons shown.

As has been demonstrated, the thing which brought about the Respondent's injury was defective and even a dangerous instrumentality in its weathered and split condition. It was placed on the car in question and many others by the Railroad. It was designed to be used as a handhold. It could be used as a handhold. It was used as a handhold or grabiron, with the full knowledge of the Railroad. It in fact was a handhold. The jury so found, and judgment originally should have been entered for the Respondent under the uniform holdings of the Federal Courts under the Federal Law. To do otherwise would usurp the functions of the jury by substituting the Trial Court's findings that such instrumentality was not a handhold. It was error on the part of the Trial Court to hold in effect, by entering judgment for the Railroad and against the Respondent, that unless an instrumentality has been specifically designated as a handhold by the Interstate Commerce Commission, it cannot be considered as such and that no liability for injury occasioned by its defective or insecure condition can be charged to the employer Railroad.

This narrow and restricted view, as contended for by Petitioner, is contrary to and in conflict with the host of decisions holding that the Safety Appliance Act should be construed liberally because of its remedial character. The entering of judgment for Petitioner in this case would be an action in conflict with the prior decision of this Honorable Court which has held that an instrumentality placed on a car that can be and is used as a safety appliance by men in their work is a safety appliance, even though the Interstate Commerce Commission's regulations are silent concerning it, and the Petitioner has the continu-

ing absolute duty to maintain such appliance in a secure condition for the safety of the men using it, the same as if it had been so designated.

WHEREFORE, the Respondent prays that the obviously correct judgment of the Honorable Court of Civil Appeals be in all things affirmed and the Petition for Writ of Certiorari be in all things denied, and for the recovery of all costs herein, in the Supreme Court of Texas, in the Court of Civil Appeals of Beaumont, Texas, and in the Trial Court.

Respectfully submitted,

GEORGE L. SCHMIDT
HAROLD PETERSON
CLAUDE ALLEN
1002 American Investors Bldg.
Houston 2, Texas

By _____
Counsel for Respondent

Certificate of Service

Attorneys for Petitioner Cleve Bachman and Major T. Bell, First Federal Savings Building, Beaumont, Texas, have been each furnished a copy of this brief by mailing the same to them at the above stated address.

_____
GEORGE L. SCHMIDT